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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EMILIO M. PORCALLA,

Plaintiff and Appellant,

v.

CALIFORNIA DIVISION OF  
GAMBLING CONTROL et al.,

Defendants and Respondents.

A092800

(San Francisco County  
Super. Ct. No. 311598)

Appellant Emilio M. Porcalla is a convicted felon. The 1998 California Gambling Control Act (Bus. & Prof. Code, § 19800 et seq.) bars convicted felons from working in the California gambling industry.<sup>1</sup> Accordingly, respondent City of San Bruno (City) denied appellant's application for a work permit under the Act. Appellant filed a petition for writ of mandate to compel the City and co-respondent California Division of Gambling Control (Division) to issue him the permit. The trial court denied the petition on the ground that a prior action by appellant against respondents was res judicata. Appellant contends the trial court erred because the prior action and the mandate petition sought to vindicate different primary rights. We disagree and affirm.

**I. FACTS**

The facts are undisputed.

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<sup>1</sup> We henceforth refer to the Gambling Control Act as "the Act." All statutory citations are to the Business and Professions Code unless otherwise indicated.

In 1988, appellant began work as a card dealer at the Casino Royale in San Bruno, California. In 1989 he became the floor manager at a San Bruno card room known as Artichoke Joe's. In June of 1991, Oleg Alex Trepetin started gambling at Artichoke Joe's and struck up a friendship with appellant and a co-worker, Joy Eppel. For conduct unrelated to appellant, Trepetin was convicted of tax fraud and sent to a federal prison.

In June of 1992, Trepetin sent appellant a letter from prison, outlining the terms of a conspiracy to file false 1991 income tax returns to obtain fraudulent refund checks. Appellant participated in the conspiracy, along with Trepetin and Eppel, while he was employed at Artichoke Joe's. In furtherance of the conspiracy appellant obtained a false name and tax identification number, and filed false income tax documents under penalty of perjury. The conspiracy involved an attempted fraud of \$244,670.

In January of 1994, appellant was convicted of conspiracy to defraud the government with respect to claims (18 U.S.C. § 286), a felony. He was sentenced to one year in prison, a two-year term of probationary supervision and a \$3000 fine.

Appellant was released from prison in January 1995. In September 1996, appellant applied to the City's police department for a work permit so he could resume working as floor manager at Artichoke Joe's. At that time, gambling in California was governed by the Act's predecessor, which did not automatically bar a convicted felon from working in the gambling industry. (Former § 19809, subd. (a)(3), repealed by Stats. 1997, ch. 867, § 2.) The police department issued appellant a work permit, and he went back to work for Artichoke Joe's.

The Act took effect in January 1998, and explicitly barred a convicted felon from working in the gambling industry. (§§ 19910.5A, subd. (b); 19850A, subd. (a)(3).) In the spring of that year, Artichoke Joe's informed appellant that the new Act required all card room employees to apply for a new work permit. Appellant applied for a new permit.

While his application was pending, appellant filed a complaint for declaratory and injunctive relief on October 23, 1998. Appellant named as defendants the Division and the San Bruno Police Department.<sup>2</sup>

The complaint alleged that appellant anticipated that the City's police department would deny the work permit on the sole ground of appellant's felony conviction, without a determination of appellant's fitness and qualifications to work as a card room employee. Indeed, appellant alleged that "any hearing on this matter will be an idle act[,] since the hearing officer will be precluded from hearing any evidence concerning [appellant's] qualifications or of his rehabilitation since the felony conviction."

Appellant's complaint alleged that the Act was unconstitutional "as applied to him" on the ground that it violated the due process and equal protection clauses of the California and United States Constitutions. He sought declaratory relief, as well as an injunction against the enforcement of the Act against him "until a hearing is held on the merits in order to make determinations as to [appellant's] rehabilitation and the establishment by [respondents] that [appellant's] felony conviction is substantially related to the qualifications, functions or duties of his position as card room manager." Appellant also sought a permanent injunction.

In December 1998, while the litigation was still pending, the police department denied appellant's work permit application because of his felony conviction. Appellant's appeal to the San Bruno City Council was denied in January 1999. Appellant's purported further appeal to the Division was rejected as procedurally improper, on the ground that the Division had no statutory authority to hear appeals of administrative actions taken by local agencies.

In appellant's action for declaratory and injunctive relief, respondents filed motions for summary judgment, based on the undisputed facts set forth above. In

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<sup>2</sup> As the City observes in its respondent's brief, appellant should have sued the City and not the police department. At all times in the litigation below, the City appeared without objection as the properly sued party. The City now properly appears with the Division as the respondents to this appeal.

addition, appellant did not dispute the fact that the Division itself did not deny him a work permit.

On September 21, 1999, the trial court granted respondents' motions as follows:

“Having reviewed the summary judgment motions filed by both defendants [i.e., respondents the City and the Division], the Court will treat these pleadings as motions for judgment on the pleadings, and grants both motions in favor of defendants.

Alternatively, the Court treats the motions as motions for summary judgment, and grants both motions in favor of defendants.

“Related to defendant Division, the Court finds there are no triable issues regarding actionable conduct by this defendant. It remains undisputed that defendant Division never denied [appellant's] application for a work permit under the Gambling Control Act . . . . Because defendant Division took no action in this matter, there is no actual controversy between [appellant] and this defendant.

“In regard to defendant [City of] San Bruno, the Court finds there are no triable issues related to [appellant's] application for a work permit or the statutory basis for [the City's] denial of [appellant's] work permit request. The Court finds that the Gambling Control Act's statutory prohibition against employment [of] ex-felons is reasonably related to legitimate public safety interests. Accordingly, [appellant's] constitutional claims must fail as a matter of law.”

The court dismissed appellant's case with prejudice. Appellant filed an appeal from the judgment of dismissal but abandoned the appeal in April 2000. We dismissed the appeal on April 18, 2000.

The next day, April 19, 2000, appellant filed a petition for writ of mandate/prohibition in the superior court, naming the Division and the San Bruno Police Department as respondents. (See fn. 1, *ante*.) Appellant's petition alleged that respondents “acted arbitrarily and capriciously” toward appellant by depriving him of his work permit, because he had “protected property and liberty interests” in his card room employment. Appellant also alleged that respondents “failed to act fairly, impartially and lawfully” toward him “in that they refused to conduct a hearing” investigating his

background or fitness to work in a card room. The petition prayed for the issuance of alternative and peremptory writs of mandate to order respondents to issue appellant a work permit, or, in the alternative, to conduct a hearing to determine why he should not receive a permit.

In his points and authorities in support of the petition, appellant argued that the Act, as applied to him, violated the due process and equal protection clauses. He also argued that an uncodified provision of the Act, section 62, gave him a right to a hearing. (Stats. 1997, ch. 867, § 62.)

Respondents opposed the petition on several grounds, including *res judicata* and the fact that a hearing would essentially be an idle act. The superior court denied the petition, primarily on the ground that it was barred by *res judicata*. The court found that the declaratory/injunctive relief complaint filed in October 1998 sought to vindicate the same primary right, i.e., the right of a felon to obtain a gambling work permit. Relying on several cases including *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, the court concluded the mandate petition raised issues that were relevant to and within the scope of appellant's prior action, and should have been raised therein. The court also ruled that compelling respondents to conduct a hearing would be an idle act, in light of the statutory bar on issuing gambling work permits to convicted felons.

## **II. DISCUSSION**

Appellant contends the mandate action is not barred by *res judicata*, and that he has a right to a hearing by statute and by constitutional and common law. We find the *res judicata* issue dispositive, and agree with the trial court that the present mandate action is barred.

The doctrine of *res judicata* prevents piecemeal litigation. (See *Henry v. Clifford* (1995) 32 Cal.App.4th 315, 321.) “ ‘ . . . A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable.’ [Citation.]” (*Ibid.*, quoting *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202; see *Duffy v. City of Long Beach*, *supra*, 201 Cal.App.3d at pp. 1357-1358.)

A prior judgment is res judicata regarding a subsequent proceeding when both the prior and the present proceeding involve the same cause of action, which is defined in the res judicata context as the same primary right. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) “[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake . . .” (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174.)

Under the primary right theory, “a cause of action consists of 1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant which consists [of] a breach of such primary right and duty. [Citation.] Thus, two actions constitute a single cause of action if they both affect the same primary right.” (*Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 898; accord, *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1246; *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 341.)

Appellant contends that his present action seeks to vindicate a different primary right from the prior action. He claims the prior action challenged the facial constitutionality of the Act, while the present action does not question the constitutionality of the Act” and seeks only to enforce what he claims is his right to a hearing.

This contention is without merit. Appellant’s comparative description of his two lawsuits is inaccurate. *Both* lawsuits raised constitutional challenges to the Act (although as applied, not on its face), and *both* lawsuits sought a hearing on appellant’s fitness to hold a work permit. Appellant attempts to avoid res judicata by characterizing the prior suit as the “apples” of constitutional challenge and the present one as the “oranges” of enforcement of hearing rights. The attempt fails. Both lawsuits sought to vindicate the same primary right—the right of a convicted felon to obtain a work permit under the Act. In the first lawsuit, appellant sought to vindicate that primary right in the context of an action for declaratory and injunctive relief, designed to obtain a hearing on his fitness for gambling employment. In the second lawsuit, appellant sought to vindicate the same

primary right in the context of a mandate proceeding—again seeking a hearing on his fitness for gambling employment. In both proceedings appellant essentially sought to continue his asserted right to employment in the gambling industry.

This case is similar to *Duffy v. City of Long Beach*, *supra*, 201 Cal.App.3d 1352. That case involved (1) an action to enjoin the demolition of a structure as a nuisance and for damages for an anticipated taking of property without just compensation; and (2) a subsequent post-demolition action for just compensation for the taking of the property. The *Duffy* court held that the “ ‘just compensation’ ” theory was raised and rejected in the prior action, such that the subsequent action was barred by res judicata. (*Id.* at pp. 1358-1359.)

Appellant also contends that his prior declaratory/injunctive relief action did not result in a final determination on the merits of his complaint, and thus works no res judicata bar to his present suit. Appellant mischaracterizes the court’s ruling disposing of the prior action: he argues the court merely granted motions for judgment on the pleadings, a ruling which appellant claims poses no bar to a subsequent action.

Appellant is mistaken. The trial court did grant judgment on the pleadings, but in the *alternative* granted summary judgment for respondents. In so doing the court found, as a matter of law, that (1) appellant had no cause of action against the Division and (2) his constitutional challenges to the City’s denial of a permit were without merit. A summary judgment has res judicata effect as a final determination on the merits. (See *Castro v. Higaki* (1994) 31 Cal.App.4th 350, 358.)

Appellant also argues his prior action for declaratory relief does not bar the present action because of Code of Civil Procedure section 1062. That statute provides that the remedy of declaratory relief is cumulative and does not restrict any other remedy provided by law, and that a declaratory relief judgment does not “preclude any party from obtaining additional relief based upon the same facts.” (Code Civ. Proc., § 1062.) Appellant argues the quoted language of the statute allows his subsequent mandate proceeding.

There are three flaws in this argument. First, appellant made no argument based on Code of Civil Procedure section 1062 in the trial court. Second, appellant's prior action was not only one for declaratory relief, but also for injunctive relief—a remedy outside the purview of the statute. Third, the quoted language of the statute “provides merely that when one obtains a declaration, he has not thereby forfeited his right to obtain coercive relief.” (*Dills v. Delira Corp.* (1956) 145 Cal.App.2d 124, 130.) The language “certainly was not intended to allow a litigant who is determined not to have any rights to relitigate his claim in quest of different relief.” (*Id.* at pp. 130-131.)

We conclude that under the applicable principles of res judicata, appellant's present mandate action is barred by his previous action against respondents. The trial court's order denying the mandate petition is correct. Accordingly, we need not reach any other issues raised by appellant, including his claim that he has a right to a hearing under the Act.



### **III. DISPOSITION**

The order denying the mandate petition is affirmed.

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Marchiano, J.

We concur:

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Stein, Acting P.J.

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Swager, J.